

**S. 1233, THE PRODUCT PACKAGING PROTECTION
ACT: KEEPING OFFENSIVE MATERIAL OUT OF
OUR CEREAL BOXES**

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
BUSINESS RIGHTS, AND COMPETITION

OF THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

ONE HUNDRED SEVENTH CONGRESS

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
DeWine, Hon. Mike, a U.S. Senator from the State of Ohio	3
Durbin, Hon. Richard J., a U.S. Senator from the State of Illinois	24
Kohl, Hon. Herbert, a U.S. Senator from the State of Wisconsin	1

WITNESSES

Burris, David, Businessman, Baker City, Oregon	7
Fisher, Alice, Deputy Assistant Attorney General, Criminal Division, Department of Justice, Washington, D.C.	5
Petrucelli, Paul, Chief Marketing Counsel, Kraft Foods North America, Inc., Northfield, Illinois	9
Sarasin, Leslie, President and Chief Executive Officer, American Frozen Food Institute, McClean, Virginia	14

SUBMISSIONS FOR THE RECORD

American Bakers Association, American Frozen Food Institute, Food Distributors International, Food Marketing Institute, General Mills, Grocery Manufacturers of America, Independent Bakers Association, Kellogg's, Kraft Foods, National Food Processors Association, National Frozen Pizza Institute, joint letter	22
American Free Trade Association, Miami, FL, statement	22
Anti-Defamation League of B'nai B'rith, New York, NY, letter	24
General Mills, Inc., Austin P. Sullivan, Jr., Senior Vice President, Corporate Relations, Minneapolis, MN, letter	25
Kellogg Company, George A. Franklin, Vice President, External Affairs, Battle Creek, MI, letter	26

S. 1233, THE PRODUCT PACKAGING PROTECTION ACT: KEEPING OFFENSIVE MATERIAL OUT OF OUR CEREAL BOXES

WEDNESDAY, AUGUST 1, 2001

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, BUSINESS RIGHTS, AND
COMPETITION, COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:06 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Herb Kohl, Chairman of the Subcommittee, presiding.

Present: Senators Kohl and DeWine.

**OPENING STATEMENT OF HON. HERBERT KOHL, A U.S.
SENATOR FROM THE STATE OF WISCONSIN**

Chairman KOHL. The Antitrust and the Business Rights Subcommittee will come to order.

Today's hearing responds to a disturbing trend of product tampering—the placement of hate-filled literature into the boxes of food that Americans bring home from the grocery store every day. Too many Americans have recently opened groceries and found offensive, racist, anti-Semitic, pornographic and hateful leaflets. In the last few years, food manufacturers have received numerous complaints from consumers who report finding such literature. Hundreds more incidents have likely gone unreported, and this behavior is downright shameful.

No one should have to face this type of assault in the privacy of his or her home, and these incidents can be especially harmful to children. Take, for example, the story of 8-year-old Mario Alexander, who discovered hateful literature in his favorite cereal box. Mario was very capable of reading the handbill he found and, as a result, he was forced to deal with a hateful issue long before he was mature enough to understand it.

These are not isolated occurrences. In fact, Kraft Foods has documented more than 80 incidents in the past 4 years alone, which is almost one every 2 weeks. General Mills has documented an additional 25 cases a year, and Kellogg's reports many more. Of course, there is no way to calculate the number of incidents that go unreported. Many other manufacturers and distributors also have stories about this type of product tampering.

So the companies that make these products are also victims. They have their names and reputations slandered by this activity. As a former grocery store owner myself, I can tell you that the

store itself that sells these products is injured as well. The consumer establishes a trust with their grocery store, and incidents like the ones we are discussing today violate that trust and harm that business.

Unfortunately, when consumers or companies turn to the authorities, they cannot be helped. According to the FBI and the Food and Drug Administration's Office of Criminal Investigation, these actions are not covered by Federal product tampering statutes. A loophole in Federal antitampering laws allows it to go unpunished, and in only a couple of States laws are in place. So, along with Senators Hatch, Leahy, Mike DeWine and Durbin, we introduced a Product Packaging Protection Act of 2001 to close this loophole in Federal product tampering law and protect consumers.

This is a small, but meaningful, thing we can do to make our current laws more effective and to give consumers and companies the help they need. The Product Packaging Protection Act of 2001 would prohibit the placement of any writing or other material inside a consumer product without the permission of the manufacturer, authorized distributor or retailer. Closing this gap in Federal law would appropriately punish people who violate the integrity of the food product, compromise consumers' faith in the food they purchase in a grocery store, and damage the good name and reputation of the food manufacturer.

Opening a cereal box in the privacy of your own home should not be risky or traumatic. Unfortunately, for one of our witnesses today, it was, just like it was for 8-year-old Mario Alexander and hundreds more. A small, simple change to a Federal law can help, and so we should do it.

We look forward today to an informative hearing. And I would now like to call on my colleague and former chairman of this committee, who will be a chairman again, I am sure, a man whom I delight in working with and for, Senator Mike DeWine.

[The prepared statement of Senator Kohl follows:]

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF
WISCONSIN

Today's hearing responds to a disturbing trend in product tampering—the placement of hat-filled literature into the boxes of food that Americans bring home from the grocery store every day.

Too many Americans have recently opened groceries and found offensive, racist, anti-Semitic, pornographic and hateful leaflets. In the last few years, food manufacturers have received numerous complaints from consumers who report finding such literature. Hundreds more incidents have likely gone unreported.

This behavior is outright shameful. No one should have to face this type of assault in the privacy of his or her home. And these incidents can be especially harmful to children. Take for example the story of eight-year-old Mario Alexander who discovered offensive literature in his favorite cereal box. Mario was very capable of reading the handbill he found, and as a result he was forced to deal with a hateful issue long before he was mature enough to understand it.

These are not isolated occurrences. In fact, Kraft Foods has documented more than 80 incidents in the past four years, almost one every two weeks. General Mills has documented an additional 25 cases per year, and Kellogg's reports many more. Of course, there is no way to calculate the number of incidents that go unreported. Many other manufacturers and distributors also have stories about this type of product tampering.

So, the companies that make these products are also victims. They have their names and reputations slandered by this activity. And, as a former grocery store owner, I can tell you that the store that sells these products is injured as well. A

consumer establishes a trust with their grocery store and incidents like the ones we're discussing today violate that trust and harm that business.

Unfortunately, when consumers or companies turn to the authorities, they cannot be helped. According to the FBI and the Food and Drug Administration's Office of Criminal Investigation, these actions are not covered by federal product tampering statutes. A loophole in federal anti-tampering law allows it to go unpunished. And only a couple of states have laws. So, along with Senators Hatch, Leahy, DeWine and Durbin, we introduced the Product Packaging Protection Act of 2001 to close this loophole in federal product tampering law and protect consumers.

This is a small but meaningful thing we can do to make our current laws more effective and to give consumers and companies the help they need. The Product Packaging Protection Act would prohibit the placement of any writing or other material inside a consumer product without the permission of the manufacturer, authorized distributor, or retailer. Closing this gap in federal law would appropriately punish people who violate the integrity of the food product, compromise reputation of the food manufacturer.

Opening a cereal box in the privacy of your own home shouldn't be a risky or traumatic even. Unfortunately, for one of our witnesses today, it was. Just like it was for eight-year-old Mario Alexander and hundreds more. A small, simple change to a federal law can help, and we should do it.

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Mr. Chairman, thank you very much. Let me thank you for holding this hearing and for introducing this bill. Along with you, I am concerned about this relatively new type of product tampering that is currently not penalized under our law.

This tampering does not involve inserting harmful ingredients into food products, but rather it involves the placement of hate-filled literature, hate-filled literature placed into boxes of cereal or other food products, products that millions of Americans purchase every day. While this type of product tampering may not send someone to the hospital, it is still very harmful to innocent victims.

As you have mentioned, Kraft Food and other companies have received and documented numerous complaints in recent years involving consumers who unwittingly opened up the product only to be shocked by the appearance of offensive, racist, pornographic and other hateful material. We have no clear indication of how many victims have suffered from this type of tampering, but we know there are many. Unfortunately, when these victims report these hateful acts, law enforcement officials must respond that they are now powerless to stop this offensive and harmful activity.

According to the Federal Bureau of Investigation and the Food and Drug Administration's Office of Criminal Investigation, these actions are not currently covered by Federal product tampering statutes. Those laws only cover the actual products themselves, but not the packaging. Now, in response to incidents in their respective States, both the States of New Jersey and California have recently passed laws to criminalize this behavior, and these States certainly should be commended. However, I believe that we must do more.

The bill that the chairman and Senator Hatch have sponsored, along with Senator Leahy, the Product Packaging Protection Act of 2001, would prohibit the placement of any writing or other material inside a consumer product without the permission of the manufacturer, authorized distributor or the retailer. Closing this gap in Federal law would appropriately punish those whose actions harm the American consumers and force their hateful messages into our

homes. This legislation would finally give law enforcement agencies the ability to come to the aid of these victims.

So, Mr. Chairman, I look forward to hearing from the witnesses today, and exploring ways that we can put an end to this offensive product tampering once and for all.

I thank the chair.

[The prepared statement of Senator DeWine follows:]

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Good afternoon. Let me begin by thanking Chairman Kohl for holding this hearing today. Along with my colleagues, I am concerned about a new type of product tampering that is not penalized under current law. This tapering doesn't involve inserting harmful ingredients into food products, *But rather* involves the placement of hate-filled literature into boxes of cereal or other food packages—products that millions of Americans purchase on a daily basis. While this type of product tampering may not send someone to the hospital, it is still very harmful to innocent consumers.

Kraft Foods Company and others have received and documented numerous complaints in recent years involving consumers who unwittingly opened products—only to be shocked by the appearance of offensive, racist, pornographic, and other hateful materials. We have no clear indication of how many victims have suffered from this type of product tampering. Unfortunately, when these victims report these hateful acts, law enforcement officials must respond that they are powerless to stop this offensive and harmful activity. According to the Federal Bureau of Investigations and the Food and Drug Administration's Office of Criminal Investigation, these actions are not covered by federal product tampering statutes. Those laws only cover the actual products, themselves, not the packaging. In response to incidents in their respective states, both New Jersey and California passed laws to criminalize this behavior. These states should be commended. However, we must do more.

The bill that Senators Kohl and Hatch have sponsored, which Senator Leahy and I have co-sponsored—the “Product Packaging Protection Act of 2001”—would prohibit the placement of any writing or other material inside a consumer product without the permission of the manufacturer, authorized distributor, or retailer. The penalty for violation of this measure would be a fine of up to \$250,000 per offense and/or imprisonment of up to three years.

Closing this gap in federal law would appropriately punish those who force their hateful messages into American homes. This legislation would finally give law enforcement agencies the ability to come to the aid of these victims.

I look forward to hearing from the witnesses today and exploring ways that we can put an end to this offensive product tampering—once and for all. Thank you.

Chairman KOHL. Thank you, Senator DeWine.

Today, we have four distinguished witnesses with us. We would like to particularly thank the Department of Justice and its representative, Deputy Assistant Attorney General Alice Fisher, testifying today on the same panel as the rest of our witnesses. This will help us expedite the hearing.

Our first witness, Alice Fisher, is Deputy Assistant Attorney General in the Criminal Division at the Department of Justice. Prior to joining the Department of Justice, Ms. Fisher served as a partner in the Litigation Department of Latham & Watkins. It is good to have you with us today, Ms. Fisher.

Also joining us today is Mr. David Burris, who has made the long trip from Baker City, Oregon, to give his testimony. Mr. Burris had the unfortunate experience of discovering some of this hateful material while preparing his Thanksgiving dinner. Mr. Burris attended Blue Mountain College and has owned and operated his own pet supply business for 20 years. Mr. Burris also helped to start the Baker County People for Human Dignity.

Also joining us today is Mr. Paul Petrucci, chief marketing counsel for Kraft North America. Mr. Petrucci is a member of

the Kraft team that addresses significant sources of consumer complaints, such as those related to unauthorized print materials. Mr. Petruccelli is an expert in food law, including marketing and regulatory issues, having served 13 years at the Federal Trade Commission's Bureau of Consumer Protection. He received his law degree from the Rutgers School of Law. Kraft is a very important company in my State of Wisconsin, and so we thank you for being here.

And, finally, we have Ms. Leslie Sarasin, president and chief executive officer of the American Frozen Foods Institute. Ms. Sarasin has been with the institute for 12 years and was elected as its president in 1999. Ms. Sarasin earned her J.D. at the University of San Diego, after receiving her bachelor's degree from Smith College.

So we thank you all for being here today. We look forward to your testimony. We ask you to limit your testimony to 5 minutes each. However, we will hold the record open for 1 week to allow you to submit written testimony of any length. After you have presented your testimony, members will have an opportunity to ask questions. So, if you would all come forward at this time.

Ms. Fisher, we will start with your testimony, and we are looking forward to hearing from you.

STATEMENT OF ALICE FISHER, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Ms. FISHER. Thank you, Senator.

Good afternoon, Mr. Chairman and Ranking Member DeWine. I am pleased to appear before you today to discuss S. 1233, the Product Packaging Protection Act of 2001. This bill would provide criminal penalties for the unauthorized insertion of written material into consumer products and the packaging of consumer products prior to the sale of these items.

Consumers in places as far apart as New Jersey and Washington State have had the unsettling experience of opening products, such as boxes of cereal, that appear untampered with and finding obscene, racist, and offensive material has been hidden inside. For example, a few years ago there were a report of numerous complaints of racist messages appearing in ice cream cups and cracker boxes. In cases such as these, young children have been exposed to offensive messages and their parents have had no opportunity to protect them.

Existing Federal law does not address this nationwide problem. So, when victims have sought redress from our Federal prosecutors, prosecutors have not had the tools to combat this activity. Currently, the primary tool for attacking product tampering is Section 1365 of Title 18 of the United States Code, the Federal Anti-Tampering Act. That law makes it a crime to tamper with consumer products, or the packaging of such products, where the perpetrator acts with reckless disregard for, or indifference to, the risk of death or serious bodily injury to an individual. This law was the result of the well-known Tylenol tampering incident in 1982, which resulted in seven deaths. There have been several Federal prosecutions under this law since its enactment.

Also, under the Federal Anti-Tampering Act, it is a crime to taint a consumer product with the intent to damage a business. This section of the law focuses on harm to the business, regardless of whether the perpetrator intends harm to the individual. Again, however, this section only criminalizes activity that actually taints a product, its labeling or its container.

The bill you are now considering would supplement the existing statute by providing criminal penalties for product tampering that takes the form of inserting written materials, such as leaflets or pamphlets, into the packages without the approval of the manufacturer, retailer, distributor or the consumer, even if the product or the package is not adulterated. Although we do not have fully comprehensive statistics available, we do know that a number of product manufacturers have experienced complaints concerning the unauthorized insertion of such materials. Even when the act of inserting such materials does not involve the adulteration of the product contained within the package, it clearly raises questions in the minds of the consumers concerning the integrity of the product that they are about to use or consume. Thus, the result of this activity is harm to both businesses and consumers who are exposed to the unwanted and often shocking materials.

S. 1233 would prohibit the placing of any written material before the sale of such a product. It is, thus, a content-neutral regulation that does not discriminate among categories of speech, rather it is targeted toward the real problem businesses and consumers face when someone places materials into our foods and our medicines.

In conclusion, the right of free expression available to all Americans under the First Amendment of the Constitution affords our citizens ample opportunity to express their views. It is inappropriate that consumer products be used as the unauthorized vehicle for conveying beliefs or illicit messages. The rights of manufacturers to market their product without interference and the needs of consumers to be free from doubts concerning the integrity of such products must be protected.

Mr. Chairman, thank you for giving the Department the opportunity to express its views on this legislation. We would be pleased to discuss this proposal with you and other Federal agencies, such as the Food and Drug Administration, that might be affected by its enactment. I would be happy to answer any questions you may have.

[The prepared statement of Ms. Fisher follows:]

STATEMENT OF ALICE FISHER, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL
DIVISION, U.S. DEPARTMENT OF JUSTICE

Good afternoon, Mr. Chairman and Members of the Subcommittee. I am pleased to appear before you today to discuss S. 1233, the "Product Packaging Protection Act of 2001." This bill would provide criminal penalties for the unauthorized insertion of written material into consumer products and the packaging of consumer products, prior to the sale of the items. Consumers in places as far apart as New Jersey and Washington state have had the unsettling experience of opening products, such as boxes of cereal, that appear untampered with and finding that obscene, racist or other offensive material has been surreptitiously placed inside. For example, a few years ago there was a report of over numerous complaints about racist messages appearing in ice cream cups and cracker boxes. In cases such as these, young children have been exposed to offensive messages, and their parents have had no opportunity to protect them. Existing federal law does not address this nationwide problem.

Currently, the primary tool for attacking product tampering is Section 1365 of Title 18 of the United States Code, the Federal Anti-Tampering Act. That law makes it a crime to tamper with consumer products, including the packaging and labeling of such products, where the perpetrator acts with reckless disregard for, or indifference to, the risk that another person will suffer death or bodily injury. This law was the result of the well-known Tylenol tampering incident in 1982, which resulted in seven deaths. There have been several federal prosecutions under this law since its enactment.

Under the Federal Anti-Tampering Act, it is also a crime to taint a consumer product or render its labeling or container false or misleading with the intent to damage a business. This section of the law focuses on the intent to cause damage to a business, regardless of whether the perpetrator has any intent to cause injury or harm to the individual who buys and/or uses the product. Again, however, the section only criminalizes activity that actually taints a product, its labeling, or its container.

The bill you are now considering would supplement the existing statute by providing criminal penalties for product tampering that takes the form of inserting written material into packages without the approval of the manufacturer, retailer, or authorized distributor, even if the product contained within the package is not adulterated. Although we do not have fully comprehensive statistics available, we do know that a number of product manufacturers have experienced complaints concerning the unauthorized insertion of written material into the packaging of their products. Even when the act of inserting such material does not involve an adulteration of the product contained within the package, it clearly raises questions in the minds of consumers concerning the integrity of the product that they are about to use or consume. Thus, the result of this activity is harm to both businesses and consumers, who are exposed to unwanted, and often shocking, materials.

S. 1233 would prohibit the placing of "any" writing inside consumer products before the sale of such a product. It is thus a content-neutral regulation that does not discriminate among categories of speech. It is targeted toward the real problem businesses and consumers face when someone places unauthorized, hidden materials into a consumer product.

As a technical matter, other federal statutes (e.g., 18 U.S.C. § 2332b(g)(3)) cross reference the definition of "serious bodily injury" contained in what is now section 1365(g)(3). Because S. 1233 would redesignate subsection (g) of 18 U.S.C. § 1365 as subsection (h), a conforming amendment should be made to 18 U.S.C. § 2332b(g)(3) and any other statute that cross references section 1365(g)(3).

In conclusion, the right of free expression available to all Americans under the First Amendment of the Constitution affords our citizens ample opportunity to express their views. It is inappropriate that consumer products be used as the unauthorized vehicle for conveying beliefs or illicit messages. The rights of manufacturers to market their products without interference and the need of consumers to be free from doubts concerning the integrity of the products they have purchased must be protected.

Mr. Chairman, thank you for giving the Department the opportunity to express its views on this legislation. We would be pleased to discuss this proposal with you and with other federal agencies that might be affected by its enactment, such as the Food and Drug Administration, in greater detail. I would be happy to answer any questions you may have.

Chairman KOHL. Thank you, Ms. Fisher.
Mr. Davis Burris?

STATEMENT OF DAVID BURRIS, BUSINESSMAN, BAKER CITY, OREGON

Mr. BURRIS. Chairman Kohl and Senator DeWine, I am David Burris from Baker City, Oregon. I have lived in Baker City most of my life and own and operate a small pet supply business there. Baker City is about 10,000 population and has a very interesting downtown historic district that has received national recognition for its restoration of gold mining era buildings. It is an excellent place to live and raise a family. As a resident, I have always felt very secure. I felt the security until last Thanksgiving time when I was getting ready to prepare a Thanksgiving meal for my guests.

I appreciate the opportunity to testify today and tell you about an incident at that time that changed all of this.

On November 22, 2000, I went to my local Safeway supermarket, which I shop at on a regular basis. As I was shopping, I purchased a JELL-O No Bake Strawberry Cheesecake mix. Later that evening, I decided to make it, and when I opened the box, I noticed a coupon—an example here. I decided to leave it in the box and retrieve it later before disposing of the box. When I went back to get the coupon, which was folded, I opened it and noticed a black Nazi swastika and some wording saying, “Deport ‘the N word,’” which I will not use. It is best not to say that. It also had initials of a group and a postal box number in Nebraska. This coupon had been made on a copying machine of some sort.

At first, I was totally shocked, as I am aware of the Aryan Nation group in Idaho nearby. I thought this might be some sort of joke, but realized it was not. I showed it to my guests, and they were shocked also. As I talked with them about it, we decided the cake itself should not be consumed. It might be contaminated. The consumer hot line number was on the box, so I decided to call JELL-O to let them know about this.

When I contacted JELL-O, the lady there said she was going to put me right through to someone that knew more about this, and they would talk to me. That person said they would like to have the box and the coupon. They asked me if there was any signs of the box having been tampered with. I told her, no, the box had no signs and was heat-sealed at the factory. They also asked me the name of the store and the street location of it. I was told by this person that a courier would be at my home the next morning at 10 a.m. to pick up the box and the coupon. The courier arrived at 9:40 a.m. He took possession of the box and the coupon and placed them in a Ziploc bag.

I have to say that since this incident, I am very insecure with packaged products I buy. I look at the box, and if I notice anything unusual, I avoid it. I doubt I will ever feel secure again in this regard. It has also changed the way my friends shop too. Something must be done to protect people from this. If a coupon can be inserted in a box in a number of different company's products, what can these people do to the product? The fact that these products are distributed nationwide scares me. What if a child had opened a box and read this hateful material?

Thank you for letting me share my story. I hope it helps you get some legislation passed that will deter this kind of activity.

[The prepared statement of Mr. Burris follows:]

STATEMENT OF DAVID BURRIS, BUSINESSMAN, BAKER CITY, OREGON

Chairman Kohl and Senator DeWine, I am David Burris from Baker City, Oregon. I have lived in Baker City most of my life and own and operate a small pet supply business there. Baker City is about 10,000 population and has a very interesting downtown historic district that has received national recognition for its restoration of gold mining area buildings. It is an excellent place to live and raise a family. As a resident I have always felt very secure. I felt this security till last year at Thanksgiving time when I was getting ready to prepare a Thanksgiving meal for my guests. I appreciate the opportunity to testify today and tell you about the Incident at that time that changed all of this.

On November 22, 2000, I went to my local Safeway supermarket which I shop at on a regular basis. As I was shopping I purchased a Jello No Bake Strawberry

Cheesecake Mix. Later that evening I decided to make it and when I opened the box I noticed a coupon. I decided to leave it in the and retrieve it late before disposing of the box. When I went back to get the coupon, which was folded, I opened it and noticed a black Nazi swastika and some wording saying deport "The N word." It also had the initials of a group and postal box number in Nebraska. This coupon had been made on a copying machine of some sort. At first I was totally shocked as I am very aware of the Aryan Nation group in Idaho. I thought this might be some sort of joke but realized it wasn't. I showed it to my guests and they were shocked also. As I talked with them about it we all decided that the cake itself could be contaminated. The consumer hotline number was on the box so I decided to call to let Jello know about this. When I contacted Jello the lady there said that she was going to put me right through to someone that knew more about this and they would talk to me. That person said they would like to have the box and the They asked me if there were any signs of the box having been tampered with. I told her no, that the box has no signs and was heat sealed at the factory. They also asked me the name of the store and the street location of it. I was told by this person that a courier would be at my home the next morning at 10 AM to pickup the box and coupon. The courier arrived at 9:40 AM. He took possession of both the box and coupon and placed them in a Ziploc bag.

On November 28, 2000 I received a letter from Carla Mikell-executive representative at the Jello/Kraft Foods Consumer Resource and Information Center. She said she was sorry to learn about the offensive literature in the Jello No Bake Desert Cheesecake with Strawberry Topping. She said that my coupon sounded similar to reports they had of other consumers finding this sort of printed materials in a number of products including those from different companies in the New Jersey stores. She told me that they were actively working with law enforcement and other companies to investigate the source of this printed material in New Jersey and that this might be related in some way. She was very nice and sent a number of free food coupons.

I have to say that since this incident I am very insecure with packaged food products I buy. I look at the box and if I notice anything unusual I avoid it. I doubt that I will ever feel secure again in this regard. It has also changed the way my friends shop too. Something must be done to protect people from this. If a coupon can be inserted in a box and a number of different companies products. . . .what can these people do to the product? The fact that these products are distributed nationwide scares me. What if a child had opened a box and read this hateful material?

Thank you for letting me share my story. I hope it helps you to get some legislation passed that will deter this kind of activity.

Chairman KOHL. We thank you, Mr. Burris.
Mr. Paul Petruccielli?

STATEMENT OF PAUL PETRUCCELLI, CHIEF MARKETING COUNSEL, KRAFT FOODS NORTH AMERICA, INC., NORTHFIELD, ILLINOIS

Mr. PETRUCCELLI. Mr. Chairman, Senator DeWine, my name is Paul Petruccielli, and I am chief marketing counsel for Kraft Foods North America. I am very grateful for the opportunity to testify on behalf of Kraft regarding the importance of the proposed Product Packaging Protection Act of 2001.

Kraft Foods is the largest branded food and beverage company headquartered in the United States. We market some of the best-known and best-loved food products in this country, including DiGiorno pizza, Oscar Mayer hot dogs, Post cereals, Kool-Aid soft drinks, Nabisco cookies and crackers, to name only a very few. Our products can be found in a pantry, a refrigerator or a freezer in virtually every home in the land.

Kraft has spent decades building consumers' trust in its brands and in the product quality that they represent. And we are increasingly concerned about reports from consumers across the country who have found offensive messages and other unauthorized mate-

rials in packages of our products. We have received approximately 80 consumer complaints since 1997 in this regard. To date, in 2001, we have received 15 such complaints, putting us on a pace to receive approximately 25 this year.

While I did not think it appropriate to distribute or quote from these materials, let me give you a flavor from some of the reports that we received. A consumer from Massachusetts found a pornographic drawing inserted into a box of JELL-O pudding. A California consumer opened a box of Minute rice and found a swastika and related literature of a racist nature. Another California consumer discovered racist comments upon opening a box of Alpha Bits cereal. Consumers in Maine and New Jersey found religious messages in Oscar Mayer Lunchables and in Post Shredded Wheat. A Pennsylvania consumer discovered an anti-meat brochure inside the box of a DiGiorno frozen pizza, and so on, and so on.

This recitation of tampering examples is, of necessity, somewhat bland. It does not begin to describe the ugly hateful nature of some of these materials, nor can I really capture the emotional and psychological impact that discovering these materials frequently has upon consumers. As we are the consumer's natural contact point, they often call us in an agitated state after being assaulted by these materials. In some instances, the consumer's young child has discovered some racist or sexist or anti-gay message, and the consumer may be distraught at the prospect of having to explain to a young child about the presence of some of these uglier elements of our society. Aside from the emotional impact of the incidents, these consumers rightly conclude that the product they purchased has been tampered with, and their first instinct, of course, is to blame Kraft Foods, despite our assurances to the contrary.

Even those consumers who are mollified somewhat by our explanations may have lost a degree of trust in Kraft Foods that we can never quite hope to recapture, and of course we have no way of knowing how many consumers' trust we may lose from what are undoubtedly the many consumers who encounter these materials upon one of our packages, but never report the incident to us.

These incidents of tampering amount to product hijacking. They cause significant injury to consumers, to manufacturers and to stores. Consumers may be emotionally harmed as a result of being accosted by some of this literature, a child may be traumatized, adults may be offended by presentation of particular beliefs or exhortations to take actions against particular groups. Manufacturers and retailers, of course, may be injured by the loss of consumer confidence and potential business that ensues from such an incident. And in this regard, it bears emphasis that we always operate on the assumption that any complaint that we receive is evidence of at least 10 other consumers who did not report the complaint to us. The injury to the reputation of a retail store or to the producer of the affected product is incalculable and, we believe, grievous.

Unfortunately, several elements of the current Federal Anti-Tampering Act render it ineffective to prevent the harm that I have just described. To more effectively protect consumers against this additional form of product tampering, we believe the act must be amended to explicitly address the conduct in question. The Senate bill would provide the Federal Government with the authority

it needs to more effectively protect consumers against individuals who insert hateful, offensive, misleading or simply unauthorized messages or pictures into the packages of consumer products.

While we are fully supportive of the bill, we would like to suggest a modification to improve its effectiveness. We would recommend that the subcommittee insert the phrase “or on” so that the bill would cover situations in which these materials are placed on the package, not just in the package. In our experience, there have been a number of such incidents, and we believe that conduct should be prohibited as well.

Mr. Chairman, the bill could help us address the problem in a manner that is narrowly tailored to address the sort of harm we have been seeing in the past few years and prevent these product tamperers from commandeering a cereal box as their personal soapbox. For this reason, on behalf of Kraft Foods, I respectfully urge enactment of the bill.

[The prepared statement of Mr. Petrucci follows:]

STATEMENT OF PAUL J. PETRUCCI, CHIEF MARKETING COUNSEL, KRAFT FOODS
NORTH AMERICA

Mr. Chairman, and distinguished Members of the Committee:

My name is Paul Petrucci, and I am Chief Marketing Counsel for Kraft Foods North America. Before joining Kraft, I spent thirteen years as an attorney for the Federal Trade Commission's Bureau of Consumer Protection, in Washington, D.C. I am grateful to the Committee for extending to Kraft an invitation to testify regarding the importance of the proposed Product Packaging Protection Act of 2001. Kraft Foods is the largest branded food and beverage company headquartered in the United States and the second largest worldwide. We market some of the best-known and best-loved food products in this country, including Kraft Macaroni 'N Cheese, Post Cereals, Kool-Aid Soft Drinks, Nabisco Cookies and Crackers, and Kraft Cheese, to name only a very few. We maintain more than 80 manufacturing and processing facilities in the United States, and our products can be found in a pantry, refrigerator or freezer in virtually every home in the land.

OVERVIEW OF THE PROBLEM

Kraft Foods has spent decades building consumer trust in its brands and in the product quality that they represent. As a producer of high quality foods with an exceptional reputation to protect, Kraft is increasingly concerned about reports from consumers across the country who have found offensive messages and other unauthorized materials in packages of our products. We have received approximately 80 consumer reports of such incidents since 1997. To date in 2001, we have received a total of 15 such reports, putting us on a pace to receive perhaps 25 complaints from consumers this year alone. These figures do not include any reports that may have been received by our recently-acquired Nabisco businesses.

In reviewing these unauthorized print materials, we have seen material of all manner and description, much of it quite distasteful. While I did not think it appropriate to distribute or quote from these materials, permit me to give you a flavor for some of the reports we have received from consumers:

- A consumer from Massachusetts found a pornographic drawing inserted into a box of JELL-O pudding.
- A California consumer opened a box of MINUTE rice and found a swastika and related literature of a racist nature.
- Another California consumer discovered racist comments upon opening a box of ALPHA BITS cereal.
- Consumers in Maine and New Jersey found religious messages in OSCAR MAYER LUNCHABLES Fun-Packs and POST Shredded Wheat.
- A Pennsylvania consumer discovered an anti-meat brochure inside the box of a DIGIORNO frozen pizza.
- A Vermont consumer complained that a package of HANDI-SNACKS crackers had a health-related warning hand-written on the outside of the box.

Of course, these are just a few examples of the problem; other product—manufacturers could undoubtedly offer many more, and so could Kraft. This recitation of tampering examples is of necessity somewhat bland. It—does not begin to describe the ugly, hateful nature of some of these—materials, nor can I adequately capture the emotional and psychological—impact that discovering these materials frequently has upon consumers. As—we are the consumer's natural contact point, they often call us in an—extremely agitated state after being assaulted by these materials. In some—instances, the consumer's young child has discovered some racist, or—sexist, or anti-gay message, and the consumer may be distraught at the—prospect of having to explain to a young child about the presence of the—uglier elements of our society.

Aside from the emotional impact of these incidents, the affected consumers—rightly conclude that the product they purchased has been tampered with.—Their first instinct often is to blame the manufacturer—Kraft Foods—despite our assurances that we are not the source of the offending material—and our efforts to persuade them that the material must have been inserted—into the package after it left our control. Even those consumers who are—somewhat mollified by our explanations may have lost a degree of trust in—Kraft that we can never recapture. Of course, we have no way of knowing how—many customers and how much consumer trust we may lose from what are—undoubtedly the many consumers who encounter these materials upon opening—one of our packages, but never call to report the incident to us. This harm—to our business is quite simply incalculable.

When we began to receive these types of reports from consumers, we did what—any responsible company would do. We pursued investigations to determine—whether it was possible that the material was being inserted by our own—employees. Over a period of time, however, we have seen that the same—messages may appear in cereal boxes produced at different manufacturing—facilities, or that messages of a certain type tend to appear and reappear—in a particular geographical region. These factors have generally led us to—conclude that the unauthorized material is inserted into or placed on the—package after it has left our control.

As these incidents began to proliferate, we turned to law enforcement—authorities at both the Federal Bureau of Investigation and the FDA's—Office of Criminal Investigation and requested that they prosecute this—activity. Unfortunately, neither agency believes that it has current—authority to prosecute such cases under the Federal Anti-Tampering statute—(18 U.S.C. 1365). As a result, both agencies have declined to investigate—the incidents we have presented to them.

TAMPERING HARMS CONSUMERS, MANUFACTURERS AND RETAILERS

These incidents of tampering amount to product hijacking, and cause—significant injury to consumers, manufacturers and stores alike. Consumers—may be emotionally harmed simply as a result of being accosted by some of—this literature. A child may be traumatized by exposure to inappropriate—material; adults may be offended by the presentation of particular—religious beliefs or by exhortations to take action against various racial—groups or other minorities.

Manufacturers and retailers, of course, may be injured by the loss of—consumer confidence and potential business that ensues from such an—incident. In this regard, it bears emphasis that reported complaints to a—company always underestimate the size of a problem that consumers may be—having—typically by a factor of tenfold or more. In addition, each—affected consumer may report the incident to relatives, friends, associates—at work, and so on. The injury to the reputation of a retail store, or to—the producer of the affected product, is incalculable and, in our view, grievous.

THE CURRENT ANTI-TAMPERING STATUTE IS NOT EFFECTIVE

As you know, Congress passed the Federal Anti-Tampering Act in 1994 to—protect consumers from the dangers of using products whose contents or—labels had been tampered with. In doing so, Congress sought not only to—guard against the physical health risks that could result from such—tampering, but also to prevent the adverse impact that the tampering would—have on consumer confidence in the integrity of products and their—packaging.

The Act generally makes it unlawful for individuals to tamper with consumer—products, their packages or labels with reckless disregard for the dangers—that could befall another person. In addition, the Act provides for—criminal penalties for individuals who tamper with these products, packages—or labels with the intent to injure a business. The Act states, in—pertinent part:

Whoever, with intent to cause serious injury to the business of any person,—taints any consumer product or renders materially false or misleading the—labeling of, or container for, a consumer product, if such consumer product—affects interstate or foreign commerce, shall be fined under this title or—imprisoned not more than three years, or both.

Unfortunately, several elements of the current Federal Anti-Tampering Act—render it ineffective to prevent the harm that has come to consumers,—manufacturers and sellers of consumer goods as a result of individuals—tampering with product packages and labels in the manner I have described.

First, Section 1365(b) of the Act requires that a person have “the intent—to cause serious injury to the business of any person” in order to be—convicted. Intent to cause harm to one particular business would be—difficult for a federal prosecutor to prove, especially in cases where—messages are placed in the products of several manufacturers and in several—grocery stores. Moreover, the Act does not cover the unfortunate situations—in which an individual tampers with a product and causes a non-physical—trauma.

Second, the Act requires that the messages added to the packaging either—“taint” the product itself or render its labeling false or misleading.—Since neither of these tests is typically satisfied in the cases involving—the insertion of unauthorized materials, this requirement effectively—thwarts law enforcement against some highly abusive tampering incidents.

These two requirements in section 1365(b) give the Act a very narrow scope—and, as a result, many instances of product tampering have fallen through—the cracks. To more effectively protect consumers against this additional—form of product tampering, we believe the Act must be amended to explicitly—address the conduct in question.

The Product Packaging Protection Act of 2001 Would Benefit Consumers and Manufacturers

The Product Packaging Protection Act of 2001 would address the limitations—of the current statute by inserting the following subsection:

Whoever, without the consent of the manufacturer, retailer, or authorized distributor, intentionally tampers with a consumer product that is sold interstate or foreign commerce by knowingly placing or inserting any writing in the consumer product, or the container for the consumer product, before the sale of the consumer product to any consumer shall be fined under this title, imprisoned not more than three years, or both.

The bill would also clarify that a “writing” includes any form of representation or communication.

This new language would provide the Federal government with the authority it needs to more effectively protect consumers against individuals who insert hateful, offensive, misleading, or simply unauthorized messages or pictures into the packages of consumer products. Without such protection, the current outbreak of unauthorized materials that have been found in packages of consumer products across the country will continue unabated. Indeed, we are fearful that the practice may increase, as those with a particular axe to grind may become increasingly emboldened by their unchecked successes.

While fully supportive of the bill, we would like to suggest a modification to improve its effectiveness. We would recommend that the subcommittee insert the phrase “or on” to the bill, so that it would address the practice of “knowingly placing or inserting any writing in the consumer product, or in or on the container for the consumer product. . . .” (emphasized language would be new). In our experience, there have been a number of instances in which individuals have used our packages to communicate their messages simply by writing or stamping their views on the box, and we believe this conduct should be prohibited as well. Moreover, we are fearful that a statutory change that is limited to those materials placed into the package will simply encourage these individuals to more aggressively use the outside of the package itself as a billboard for their inappropriate communications.

Mr. Chairman, the Product Packaging Protection Act of 2001 could help us address this problem in a manner that is narrowly tailored to address the sort of harm we have been seeing in the past few years, and prevent these product tamperers from commandeering a cereal box as their personal soapbox. For this reason, on behalf of Kraft Foods, I respectfully urge enactment of the bill.

Thank you once again for the opportunity to speak to you this afternoon. I look forward to your questions.

Chairman KOHL. We thank you, Mr. Petrucci.
Now, Ms. Leslie Sarasin.

STATEMENT OF LESLIE SARASIN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN FROZEN FOOD INSTITUTE, MCLEAN, VIRGINIA

Ms. SARASIN. Thank you, sir. Thank you, Chairman Kohl and Senator DeWine. I am Leslie Sarasin. I am president and CEO of the American Frozen Food Institute. I commend you on your work on this very important issue to the food industry and certainly appreciate the opportunity to speak today at this hearing.

The American Frozen Food Institute, known as AFFI, is the national trade association that represents some 550 companies who are responsible for approximately 90 percent of the frozen food processed and sold annually in the United States, valued at approximately \$60 billion. AFFI's members manufacture, freeze, and market products ranging from juice and branded and private label frozen vegetables to brand-name pizzas, entrees, meals, and gourmet desserts. As the representative of these manufacturers, AFFI is concerned with the recent incidents of offensive messages being placed in and on the packages of consumer products across the country.

In recent years, there have been numerous reports from companies in the food industry of consumer complaints regarding offensive materials that consumers have found attached to or inserted in the packages of a variety of consumer products, including frozen foods. It is believed this tampering activity occurred while the products were on store shelves. Often, the offensive materials are inserted within the product packaging so that consumers are not aware of them until they open the products at home. In other instances, offensive or misleading stickers or labels have been affixed to product packaging in the store.

The materials found inside product packages are extremely offensive, often containing pornography and messages of hate and encouraging violence against members of various ethnic, religious, or cultural groups. In instances in which consumers have discovered labels placed on packages by third parties, the text of these labels was either related to the product inside the packaging or another consumer product. As a result, many consumers mistakenly believe the manufacturer had supplied the messages.

AFFI believes individuals should not be allowed to place such stickers on commercial products, since the tampering may detrimentally affect the confidence consumers have in the underlying product. For example, a consumer may open a frozen entree package and find a piece of paper containing hateful language and offensive graphic images. The consumer likely would lose trust in the manufacturer of the product and be wary of purchasing the same product or even products by the same manufacturer in the future. This loss of consumer confidence is possible, even if the tampering does not affect the product within the package or the product's labeling.

Consumers assume the manufacturer is responsible for the entire product packaging. Finding materials in or on the packaging, therefore, likely will cause consumers to lose confidence in the safety of the actual product and in manufacturers' safety precautions generally. Similarly, consumers may lose confidence in the store in which the product was purchased. For companies dependent on

consumer patronage, development of consumer confidence in the companies' products or services is critical.

Without the protection offered in S. 1233, AFFI believes these recent incidents of tampering will continue—further jeopardizing consumer privacy and consumer confidence in manufacturers and retailers.

Some concern has been expressed that S. 1233 might impose too severe penalties and that these penalties may be used against, for example, a child who affixes a cartoon sticker onto a product in a store. AFFI members are comfortable that Congress is creating a sufficient record, as a result of this hearing and the hearing held recently in the House of Representatives on H.R. 2621, to demonstrate that the intent of this legislation is to identify and punish those who abuse a private consumer product transaction to invade the privacy of a consumer's home with their message. Where such an invasion is particularly offensive, it warrants prosecution; an incidental or innocuous invasion does not.

I would note that AFFI endorses the Senate bill with regard to the nature of the penalty. I would ask this committee to recognize that both the 3-year sentence and the fines related to violations of the act are minimums and not maximums. Therefore, prosecutors and courts retain a great deal of discretion in determining the incidents that merit prosecution and how best to sentence those who are convicted.

Given the potentially traumatic effect on consumers and businesses of these abusive incidents, I respectfully submit that prosecutors and courts should be allowed latitude to punish those who do so as felons.

Moreover, AFFI supports the provision contained in the House bill that prohibits placing materials in or on consumer products. AFFI believes this provision is significant, since misleading materials affixed to product packaging may just as significantly affect consumer confidence as those inserted in packaging.

We believe S. 1233 will provide a very effective tool to combat these incidents of consumer product tampering. The bill has been drafted in a way that would provide increased protection to consumers, manufacturers and retailers from the effects of tampering.

Thank you for this opportunity to appear today. I would be happy to answer any questions you may have.

[The prepared statement of Ms. Sarasin follows:]

STATEMENT OF LESLIE G. SARASIN, CAE PRESIDENT AND CHIEF EXECUTIVE OFFICER,
AMERICAN FROZEN FOOD INSTITUTE, MCLEAN, VIRGINIA

Thank you, Chairman Kohl and members of the Committee. I am Leslie Sarasin, president and chief executive officer of the American Frozen Food Institute of McLean, Virginia. AFFI is the national trade association that represents frozen food processors, marketers and suppliers to the industry. AFFI's membership of 550 companies is responsible for approximately 90 percent of the frozen food processed annually in the United States, valued at approximately \$60 billion. We appreciate the opportunity to appear before the Subcommittee today to discuss the issue of tampering with consumer products, specifically S. 1233, the "Product Packaging Protection Act of 2001." AFFI's members manufacture, freeze and market products ranging from juice and branded and private label vegetables, to brand-name pizza, entrees, meals and gourmet desserts. As a representative of these manufacturers, AFFI is very concerned with the recent incidents of offensive messages being placed in and on the packages of consumer products across the country.

OVERVIEW

In 1994, Congress passed the Federal Anti-Tampering Act¹ (the “Act”) to protect consumers from the dangers of using products whose content or labels had been tampered with. The Act was intended to safeguard consumers from physical health risks related to such tampering and to protect consumer confidence in commercial products. While the 1994 Act has effectively addressed certain incidents of tampering with consumer products, there are still gaps in the law that fail to address the recent nationwide outbreak of tampering with product packages and labels. The Product Packaging Protection Act of 2001 aims to fill-in these gaps in the law.

OFFENSIVE AND MISLEADING MATERIALS HAVE BEEN INSERTED IN AND PLACED ON PRODUCT PACKAGES

In recent years, there have been a number of reports from companies of consumer complaints regarding offensive materials that consumers have found attached to, or inserted in the packages of a variety of consumer products, such as cereal and frozen foods. The companies who have received these reports and law enforcement authorities believe that this offensive tampering activity occurred while the products were on store shelves. Often the offensive materials are inserted within the product packaging so that consumers are not aware of them until they open the products at home. In other instances, offensive or misleading stickers or labels have been affixed onto product packaging in the store affecting consumer confidence and willingness to purchase the product.

The materials found inside of product packages are often extremely offensive. Many materials contain messages of hate and encourage violence against members of various ethnic, religious, or cultural groups. The images in these materials are offensive and shocking to many adults and would traumatize most children. For example:

One message suggests that a well-know film director be murdered because of the content of his work. A telephone, address, and website is provided.

Other messages promoted Nazi causes.

Several other messages advocated genocide against religious and ethnic minorities.

In addition to these patently offensive messages, some consumers have discovered labels placed onto packages by third parties. Since the text of these labels was either related to the product inside the packaging or another consumer product, many consumers mistakenly believed that the manufacturer supplies the messages. On some products, stickers were attached that stated that the products could pose serious health and environmental risks. People should not be allowed to place such stickers on commercial products without the knowledge and consent of manufacturers or others involved in the commercial distribution of the product since the tampering may detrimentally affect the confidence consumers have in the underlying product.

TAMPERING HURTS CONSUMERS, MANUFACTURERS AND RETAILERS

Incidents of tampering jeopardize the critical relationship between manufacturers of consumer products and their customers. Furthermore, the effects of tampering incidents can be harmful to consumers, manufacturers, and stores.

For example a consumer may open a frozen entre package and find a piece of paper containing hateful language and offensive graphic images. The consumer would likely lose trust in the manufacturer of the product and be wary of purchasing their products in the future. This loss of consumer confidence is possible even if the tampering does not affect the product within the package or the product's labeling. Consumers assume that the manufacturer is responsible for the entire product packaging, finding materials inserted in or on the packaging may cause consumers to lose confidence in the safety of the actual product and in the manufacturer's safety precautions generally. The simple fact that a product was tampered with at any level, even with materials unrelated to the product itself, might cause consumers to question the overall product safety and jeopardize their continuing relationship with the manufacturer. Similarly, the consumer may lose confidence in the store where the product was purchased. They may feel that the store management did not take sufficient precautions either in purchasing its inventory from manufacturers or in safeguarding the products on its store shelves. For companies dependent on consumer patronage, development of consumer confidence in the com-

¹ 18 U.S.C. § 1365 (2001).

panies' products or services is critical. Offensive materials in or on the packaging of a product can irreparably harm the trust-relationship between manufacturers or retailers, and consumers.

THE PRODUCT PACKAGING PROTECTION ACT OF 2001
PROTECTION ACT OF 2001 WOULD BENEFIT CONSUMERS AND MANUFACTURERS

The Product Packaging Protection Act of 2001 would fill in gaps in current law to more effectively protect consumers against individuals who insert hateful, offensive or misleading messages or pictures into or on the packages of consumer products. Without such protections these recent incidents of tampering could continue and further jeopardize consumer privacy and consumer confidence in product manufacturers and retailers.

There has been some concern that the Product Packaging Protection Act of 2001 might impose too severe penalties and that these penalties may be used against, for example, a child who affixes a cartoon sticker onto a product in a store. I think that Congress is creating a sufficient legislative record as a result of this hearing and the hearing held in the House of Representatives on H.R. 2621, the House version of this bill, to demonstrate that the intent of this legislation is to identify and punish those who abuse a private consumer product transaction to invade the privacy of a consumer's home with their message. Where such a trespass is particularly offensive, it warrants prosecution. An incidental or innocuous trespass would not.

I would note that AFFI endorses the Senate bill with regard to the nature of the penalty. I would ask this Committee to recognize that the 3-year sentence is a maximum and not a minimum, similarly the fines related to violations of this act are expressed in terms of maximums and not minimums. Therefore, prosecutors and courts retain a great deal of discretion regarding which incidents to prosecute and how best to sentence those who are convicted. Given the potentially traumatic affect on consumers and businesses of these abusive incidents, we respectfully submit that prosecutors and courts should be allowed latitude to punish those who do so as felons.

AFFI, however, supports that part of the House bill that prohibits placing materials "in or on" consumer products. The Senate bill does not prohibit persons from placing materials on product packaging. This provision is significant since misleading materials affixed to product packaging may just as significantly affect consumer confidence as those inserted in packaging. Furthermore, many of the materials affixed on packages are designed to resemble the manufacturer or store labeling and are therefore likely to be incorrectly attributed to these companies by consumers. It would likely be no less shocking to a consumer to find offensive materials on a package than within the packaging itself, and the more these materials appear to be "legitimate", that is from the manufacturer or store, the more misleading effects they can have. For that reason I would urge the members of this Committee to consider including a prohibition of tampering both in and on consumer products, as the House bill provides.

The Product Packaging Protection Act of 2001 could be a very effective tool to combat these incidents of consumer product tampering. The bill has been drafted in a way that would provide increased protection to consumers, manufacturers, and retailers from the effects of tampering. In addition, the bill language in conjunction with a clear legislative record will ensure that the law is used to address the sort of harmful tampering we've seen in recent years. For these reasons, I urge you on behalf of AFFI to support the Product Packaging Protection Act of 2001.

Thank you for this opportunity to present the views of the American Frozen Food Institute. I would be happy to answer any questions you may have.

Chairman KOHL. Thank you, Ms. Sarasin.

Ms. Fisher, we will start with you. Do you see any constitutional problems with this bill? Someone suggested that the bill criminalizes political speech. We believe the bill is constitutional because the illegal act is the insertion of the material and not what is written on it.

Ms. FISHER. Well, the bill on its face is content neutral and applies to any writing, not only political writing. So, therefore, it does not, in our view, criminalize political speech.

Chairman KOHL. OK. What does the Justice Department do to make sure that statutes like these are applied in a way that respects the First Amendment?

Ms. FISHER. Well, the Department enforces all laws, as they are written on their face, and this one does not impinge on the First Amendment. In addition, all Federal prosecutors take an oath to uphold the Constitution and are required to apply laws with regard to all individual's constitutional rights. In addition to that, whenever new legislation comes out, there are policy guidelines that come out with it that would highlight any potential First Amendment issues.

Chairman KOHL. Thank you. Do you believe that statutes like these will help to deter people from putting offensive material in packages?

Ms. FISHER. We certainly hope so. It is likely that there may not be a great number of cases brought under this statute, but having a prosecution of an individual or a group of individuals and the public notoriety surrounding that would provide a significant deterrent, along with the significant criminal penalties that go along with the activity.

Chairman KOHL. Some have suggested, Ms. Fisher, that Congress should not legislate in this area, since Congress has passed Federal product tampering laws in 1994. It is our feeling that we are only improving the law or a law that already exists and not legislating a new law. Would you see it this way, also?

Ms. FISHER. Yes, we do. We would see this as a supplementation of the existing law, the Federal Anti-Tampering Act.

Chairman KOHL. OK. Thank you.

Mr. Burris, we thank you, first of all, for coming all the way from Oregon to share your story with us. Hopefully, your efforts will be rewarded with this passage of this legislation.

Mr. Burris, were you surprised to hear that there is no Federal law that prohibits these acts?

Mr. BURRIS. I was really surprised. I thought there must be something. I was just totally surprised there was not.

Chairman KOHL. OK. And has your experience changed your behavior in any way when it comes to grocery shopping today?

Mr. BURRIS. It really does because I look at everything, like I said earlier, I look at everything I buy because I do not know. I mean, after this experience, I do not know what I am going to face. I check everything out real closely.

Chairman KOHL. Do you go grocery shopping every week?

Mr. BURRIS. Yes. I do a lot of checking, after that experience.

Chairman KOHL. Do you shop at one of the chain stores?

Mr. BURRIS. Yes, I shop at Safeway mostly.

Chairman KOHL. Safeway?

Mr. BURRIS. Right.

Chairman KOHL. OK. We will get back to you, if you would like to make some additional comments.

Ms. SARASIN AND MR. Petrucci, we have heard about many incidents involving dry cereal boxes. Can you tell us what other types of foods are most frequently targeted. Are there some food products more susceptible to package tampering than others?

Mr. PETRUCCELLI. Well, I can tell you that we have seen the problem on a variety of different products, not just cereal boxes. For example, this was a JELL-O pudding, I believe, that you had, Mr. Burris.

Mr. BURRIS. It was a strawberry cheesecake.

Mr. PETRUCCELLI. A strawberry cheesecake.

We have seen it on Oscar Mayer Lunchables, we have seen it on several of our JELL-O products, I believe a Capris Sun product. I would have to sort of check my notes, Mr. Chairman, but on a number of different products, as well as frozen pizzas. We have had the problem on those products as well.

Chairman KOHL. Ms. Sarasin, do you have any comment on that question?

Ms. SARASIN. Yes. We have seen a number of incidents on the frozen side of the business, particularly as it relates to frozen pizzas. As you, perhaps more than most in the Senate, are aware, the nature of the packaging of frozen food products probably contributes to these incidents. Because of the perishable nature of the frozen food products, as you are aware, most frozen food products are packaged internally and then there is an external package around those to maintain the integrity and quality of the product. Most of these incidents appear to be situations in which the literature is inserted into the outer package, which does not come into contact, of course, with the inner food product because it is individually wrapped inside.

It appears to me that perhaps the groups or the individuals who are engaged in this activity understand very well what the extent of the current Federal anti-tampering statute is, and they understand very well that that type of behavior is not prohibited by law. So they are pushing this sort of to the extent they can under the current statute without fear of being prosecuted.

Chairman KOHL. Mr. Petrucci, Ms. Sarasin, one of the most disturbing things about this behavior is what it does to children. There is growing evidence that hate groups often target children with their message. Do you have evidence that children's products are being singled out, Mr. Petrucci?

Mr. PETRUCCELLI. I do not know whether I would say that they are being singled out, Mr. Chairman. I would say that we commonly have the problem with children's products. Alpha Bits cereal, for example, has been the subject of this kind of problem on a number of occasions, and, frankly, I have that sort of nightmare vision of a little child who learns how to spell Nazi by getting the information inside an Alpha Bits cereal box. I guess I would like to try and avoid that if I can.

Chairman KOHL. Ms. Sarasin?

Ms. SARASIN. You know, it is an interesting question because I think the definition of what we have traditionally called children's foods is probably changing. As we are all aware, children are more and more involved in the decision-making that is done when food purchases are made for the home. I think the industry statistic we use now is that 50 percent of frozen foods that are purchased in the home are influenced by children in the household. So that, in conjunction with the facts that so many children are at home alone after school preparing their own snacks when they get home from school and using the microwave to do it, and, fortunately, eating a lot of frozen foods when they do that, I think increasingly we have lots and lots of products that would be considered children's foods because children are preparing them in record numbers.

So, yes, I think this definitely is influencing children's food, perhaps as much or more than others.

Chairman KOHL. Mr. Petrucci, few things can be more frustrating for a company like Kraft than to have your good name dragged into a situation of this sort. Can you give us an idea about the effect that these incidents have had on Kraft's brand name and tell us a little bit about what actions you have taken to counteract any negative publicity.

Mr. PETRUCCELLI. Well, I wish I could measure, in specific terms, in dollar terms, what the potential impact is on Kraft's brand names and Kraft's reputation, but I think it is the kind of thing that is just too hard to calculate.

As I am sure you know, we spend millions of dollars a year advertising our brands, advertising our products. We spend millions of dollars trying to figure out how to make the packages appealing to consumers. We do a great many things in the community, contribute to the communities that we work in, that we live in—all part of our efforts to be well thought of as a corporate citizen, and this sort of thing just tears down a lot of those efforts.

We can try to be comforting to someone like Mr. Burris when they contact us and try to provide some free product to them and, you know, indicate what we can about what the state of the law is and how we think it may have happened, but it is very difficult to get that corporate trust back once you start to lose it with individual consumers.

Chairman KOHL. Ms. Sarasin, you mentioned in your written testimony that this sort of tampering affects not only the way consumers feel about the brand-name products, but also the grocery store where they purchase their product. Can you tell us a little bit about comments that you may have received from grocery stores.

Ms. SARASIN. I do not have any specific anecdotes of comments that we have received from grocery stores, but I think it is important to note that among the groups that are very much in support of passage of this legislation are the Food Marketing Institute and the National Grocers Association, both of which represent retailers all across the country who are on the front line and experience this type of problem on a daily basis.

Chairman KOHL. Mr. Petrucci and Ms. Sarasin, Kraft and many other companies have done a good job of cataloguing the complaints about this activity. Do you think these reports are just the tip of the iceberg? Do you believe that there are many more incidents occurring than those we are aware of?

Mr. PETRUCCELLI. Yes, Mr. Chairman. I always believed that there are many more incidents occurring than those that we are aware of. The statistic that is commonly used by consumer affairs professionals is that every complaint represents, at best, 10 percent of the number of consumers who are actually affected by the problem, sometimes a much smaller percentage but, at best, 10 percent. So there would certainly be many more consumers who are experiencing this kind of affront, but not reporting it to us.

Chairman KOHL. Ms. Sarasin, do you believe that this is a national issue?

Ms. SARASIN. Certainly I do. And I think, as I mentioned in my previous response, the support of national trade associations, in ad-

dition to the organizations that represent retailers all over the country, I am aware that there are some half-dozen or so other national trade associations that support this legislation that represent much broader categories than the frozen category, as well as niche organizations that represent the baking industry. So I would say, yes, this is very much of concern to national constituencies.

Chairman KOHL. Thank you.

When we have been asked about why are Federal laws needed in this area, we have answered that Congress has chosen to legislate in product tampering law. This bill simply makes a small amendment to the criminal code. Do you have any problems with the way in which we are going about this?

Ms. SARASIN. Are you asking me?

No, I do not have any problems with the way you are going about it. I think the issue that I mentioned, both in my written testimony and the verbal testimony of the "in or on" the packaging issue is one that we believe is very significant, and it is our hope that you will take another look at that and consider incorporating any types of stamps or stickers or other things that are affixed to the outside of the package, as well as that that is included in the package because we believe that the things that are on the outside of the package are no less offensive than those that are inside the package, and perhaps maybe even more offensive because more people see them if they are sitting on a supermarket shelf.

Chairman KOHL. That is true.

Ms. SARASIN. So I think that would be our No. 1 issue.

Chairman KOHL. OK. Does anybody else have comments you would like to make before I begin to draw this hearing to a close?

Ms. FISHER, Mr. BURRIS, anything you would like to say?

Ms. FISHER. No, Senator. Thank you.

Mr. BURRIS. No, I am fine.

Chairman KOHL. We have received several important letters supporting this bill. We would like to insert into the record a letter of support from the Anti-Defamation League, one from General Mills, one from Kellogg's and another signed by a number of companies, including Kraft Foods, the American Bakers Association, the American Frozen Food Institute, Food Distributors International, the Food Marketing Institute, General Mills, the Grocery Manufacturers of America, the Independent Bakers Association, and the National Food Processors Association, Kellogg's, and the National Frozen Pizza Institute. We thank all of them, and we will make their letters a part of the hearing record.

Chairman KOHL. If there are no further questions, we want to thank all of the witnesses for your testimony. It has been a very important hearing, in my judgment, and this has been very informative. It will help us a lot as we go about turning this into real-life legislation that we hope to get done within several months.

We thank you all for coming, and this hearing is closed.

[Whereupon, at 2:46 p.m., the subcommittee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

August 1, 2001

The Hon. Herb Kohl, Chairman
 Subcommittee on Antitrust, Business
 Rights, and Competition
 Committee on the Judiciary
 U.S. Senate
 Washington, DC 20510

Dear Chairman Kohl:

Thank you for your recent introduction of S. 1233, the Product Package Protection Act of 2001, that would prohibit unauthorized writings in consumer products. We also greatly appreciate the expressed support of Senators Hatch, Leahy, DeWine and Durbin through their co-sponsorship of this important measure.

In recent years consumers have complained of neo-nazi and hate literature, pornographic pictures, and other offensive and unauthorized materials being attached to, or included in, various consumer products. Typically these offensive materials are tightly folded and slipped into consumer products that have box packaging with an inner wrapper. When the consumer opens the box, these offensive messages are the first thing he or she sees. What is most troubling is that so often these messages are found in or on consumer products used by children, such as cereal boxes.

Unfortunately, no Federal law exists to stop these alarming practices. Because the papers and materials do not physically touch the food product, it is not a violation of the Federal Anti-Tampering Act. S. 1233 would make such activities a Federal crime, and would amend the Federal Anti-Tampering Act by making it a felony for any person to stamp, print, place, or insert any writing in any consumer product or the box, package, or other container for the product, prior to its sale to any consumer. Because S. 1233 does not prohibit persons from placing materials on product packaging, we also ask that the bill prohibit tampering both "in and on" consumer products. We also understand the bill is intended to exempt writings and markings made by a product manufacturer, retailer, or distributor of the product in the due course of business for promotional or sales purposes. A person convicted under the Act would be fined and/or imprisoned for not more than three years.

We appreciate your continued support for S. 1233, and urge its swift consideration.

American Bakers Association
 Food Distributors International
 General Mills
 Independent Bakers Association
 Kraft Foods
 National Frozen Pizza Institute
 American Frozen Food Institute
 Food Marketing Institute
 Grocery Manufacturers of America
 Kellogg's
 National Food Processors Association

Statement of Gilbert Lee Sandler, American Free Trade Association, Miami, Florida

The Product Packaging Protection Act of 2001 (S. 1233) has been drafted to address legitimate concerns of food manufacturers that have arisen due to the unauthorized insertion of inflammatory written materials in branded products prior to delivery to the ultimate consumers. AFTA endorses the intent of this legislation and is supportive of the House version of this bill (H.R. 2621), introduced on July 25, 2001. However, the differences between H.R. 2621 and S. 1233 concern the members of AFTA, who believe that the laudatory intentions of the legislation are compromised by the Senate version of the bill.

The Senate version would appear to prohibit many legitimate activities that currently play a critical role in fostering growth and competition in the American marketplace and benefit U.S. consumers. In addition, contrary to its stated intent, the current version of the Senate bill appears to actually allow certain entities to place any type of writings in or on goods or packaging without limitation or prohibition.

Accordingly, because AFTA supports legislation that would punish the unacceptable insertion of offensive materials in products offered to U.S. consumers, it recommends that S. 1233 be amended to conform to H.R. 2621.

In that regard, the American Free Trade Association offers the following suggested amendments to S. 1233, as introduced. These amendments would conform S. 1233 to the House version of the bill, H.R. 2621, and would, therefore, strengthen the legislation by prohibiting unlawful conduct while still protecting commercial activities that are common, and desirable, within the U.S. marketplace.

First, the language currently in H.R. 2621 that prohibits anyone from inserting offensive writings in consumer goods but which, nevertheless, protects common, necessary and lawful business activities should be added to S. 1233.

Second, the term “Authorized distributors” used in the bill should be amended to “Distributors” so that legitimate sales and promotional activities are protected without discrimination.

The following discussion highlights AFTA’s concerns regarding S. 1233:

Activities of all Product Distributors Should Remain Legal

Both H.R. 2621 and S. 1233 intend to prohibit the placement of offensive writings in or on products or product packaging. However, because what may be offensive to one person may not be to another, and to address constitutional free speech concerns, the definition of prohibited “writings” in both bills is necessarily broad and would include seemingly innocuous activities such as placing coupons in boxes, adding warranties or marking “two for one” on a promotional box. “Writings,” under the current definition, could even include stickers placed on boxes to indicate correct weight measurements under FDA regulations. While AFTA understands and appreciates the need for such a broad definition of prohibitive writings, it believes that it is critical that the legislation protect legitimate forms of business practices that may, inadvertently, fall within the prohibitions set forth in this legislation. Accordingly, S. 1233 should be amended so that these activities of all product distributors remain legal.

S. 1233 should include language prohibiting the insertion of offensive materials by anyone

H.R. 2621 prohibits writings placed in or on products or packages without the consent of the manufacturer, retailer or distributor in the normal course of business for promotional or sales purposes. However, S. 1233 prohibits the placement of writings without the consent of the manufacturer, retailer or “authorized” distributor and relieves these parties from liability under the Act in all circumstances. We believe that the language in S. 1233 should be identical to that language contained in the House version of the bill in order to prohibit the undesirable behavior completely, regardless of who commits the crime. In its present form, for example, S. 1233 provides no recourse against the retailer who may believe that it has the right to insert neo-Nazi literature in product boxes on its shelves. So long as the retailer, manufacturer or authorized distributor consents to the placement of a prohibited writing, S. 1233 appears to permit such an action. This would seem to be contrary to the intention of the legislation.

S. 1233 should include language protecting legitimate business practices of all product distributors

The exemption made for acceptable business practices set forth in H.R. 2621 makes no distinction between an “authorized” distributor and all other product distributors because it exempts legitimate business activities that are often required by law or commercial reality. The fact is that all distributors may need to insert some writings in or on products prior to sale to the consumer. For example, distributors may place coupons in packages or disclaimers on containers; they may add special warranties or promotional tie-ins of one product purchased with another. Distributors may elect to stamp products with “Reduced Cost” labels or “Two for One” tags and may include customized warranties to customers. Distributors may, in fact, combine a shaver with shaving cream and repackage the combination promotional product to indicate proper content, weight and trademark information as required under existing law. Legitimate repackaging and promotional activities are conducted by both distributors “authorized” by the manufacturers to initially sell the products and those distributors that subsequently sell the goods through the discount marketplace. Regardless of who performs this legitimate business activity, the prohibitions set forth in this legislation should not apply. Rather, the legislation should be amended to clearly prohibit certain activities, without concern to who performs them. Accordingly, S. 1233 should be amended so that legitimate business practices of all product distributors, whether or not “authorized” as such initially by the product’s manufacturer, are protected.

BACKGROUND INFORMATION ON THE AMERICAN FREE TRADE ASSOCIATION

The American Free Trade Association (AFTA) is a not-for-profit trade association of independent American importers, distributors, retailers and wholesalers, dedicated to preservation of the parallel market to assure competitive pricing and distribution of genuine and legitimate brand-name goods for American consumers. The parallel market embraces a broad range of products but AFTA's members are primarily involved in sale and distribution of fragrances, colognes, health and beauty aids (e.g. shampoo, soap, etc.). AFTA has been an active advocate of parallel market interests for over fifteen years. It has appeared as amicus curiae in the two leading Supreme court cases affirming the legality of parallel market trade under the federal trademark, customs and copyright acts (the 1985 Kmart case and the 1998 Quality King case) and in numerous lower court decisions.

AFTA's members distribute brand name products, pursuant to U.S. laws and regulations, in connection with which the manufacturer has already made its initial sale and profit. In this way, American consumers are provided with greater access to luxury goods and the benefits of a truly competitive marketplace. However, as "unauthorized" distributors, AFTA's members would not be exempted from the prohibitions contained within S. 1233 as drafted.

ANTI-DEFAMATION LEAGUE
NEW YORK, NY 10017
July 31, 2001

The Hon. Herber H. Kohl
U.S. Senate
Washington, D.C. 20510

Dear Senator Kohl:

We write in support of S. 1233, the Product Packaging Protection Act of 2001, legislation you have introduced along with Senators Hatch, Leahy, DeWine and Durbin.

The Anti-Defamation League is a civil rights and human relations agency with over 80 years of experience confronting extremist and hate group activity. We have supported similar consumer protection legislation in California, because we believe there should be consequences for this kind of product tampering by extremists and hate-mongers.

We strongly believe the proposed legislation raises no First Amendment issues. The First Amendment does not give individuals the right to hijack people's property for use as a vehicle for their own opinions. The Constitution does not require citizens to be subjected to read racist and anti-Semitic materials in their own homes against their will. As an organization, ADL is firmly committed to the idea that the best way to fight hate speech is with more speech. That does not mean, however, that we believe that this kind of vandalism should be countenanced under the banner of free speech.

We urge the Committee to act favorably on this legislation.

Sincerely,

GLEN A. TOBIAS
National Chairman

ABRAHAM H. FOXMAN
National Director

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Thank you, Mr. Chairman. Before I begin, I want to acknowledge and thank Paul Petrucci, who is testifying on behalf of Kraft Foods North America, Inc., which is based in Northfield, Illinois. Kraft has been a leader in the effort to address this important issue.

I am pleased to join Senator Kohl as an original cosponsor of the Product Package Protection Act of 2001. In the past several years, consumers have been discovering

offensive and highly provocative material in products they purchase at retail stores and supermarkets. When consumers and food manufacturers report these incidents to authorities, however, the government was unable to do anything about it. That is because under our current laws, neither the Federal Bureau of Investigation nor the Food and Drug Administration has the authority to prosecute these incidents under the Federal Anti-Tampering Act.

Hatmongers who choose to tamper with consumer products should not be permitted to engage in this activity with impunity. One of the leaflets that was inserted into a consumer product read "IF IT AINT WHITE. . .WASTE IT." The graphic leaflet depicted a person of color being shot. Imagine for a moment a small child opening up a box of cereal at the breakfast table and finding this leaflet. This is not a scenario any parent wishes to encounter—but it is one that many parents undoubtedly have faced over the past few years.

With the new legislation we introduced recently, hate groups will find that when they tamper with consumer packaging, they will be tampering with the law. We are providing law enforcement officials the tools they need to go after individuals who choose to hide behind consumer packaging to convey their hateful messages. The bill includes a common sense exception for writings and markings made by product manufacturers, retailers, and distributors of consumer products in the course of business and for promotional and sales purpose.

This legislation has already been marked-up and reported favorably by a House Judiciary Subcommittee. I hope that the Senate will move swiftly to enact this important legislation.

GENERAL MILLS, INC.
MINNEAPOLIS, MINNESOTA
July 30, 2001

Senator Herb Kohl, Chairman
Antitrust, Business Rights, and Competition Subcommittee
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Kohl,

On behalf of General Mills, I am writing to express strong support for S.1233, legislation to amend the Federal Anti-tampering Act. This bill makes it a felony for any person to stamp, print, place, or insert any writing in or on any consumer products or the box, package or other container for the product, prior to its sale to any consumer.

General Mills receives 20 to 25 consumers complaints a year on matters relating to unauthorized, and often highly offensive, material inserted into or attached to our product boxes.

After investigation, we have determined that this material has been placed in or on our product boxes after they have left our control, most often once the product is on the store shelf. The material often espouses a variety of racist and other cause-related positions. Consumers, like all of us, are understandably angry and upset, particularly when it is their children who have opened the package.

We have approached federal law enforcement authorities, both the FBI and the FDA's Office of Criminal Investigation, to request that they investigate and prosecute this activity. Unfortunately, neither agency believes it has authority to prosecute under 18 U.S.C. 1365 and both have declined to investigate these incidents. Although California and New Jersey have adopted measures making this activity a crime, there remains an enormous gap at the federal level to appropriately punish those that commit these acts.

We appreciate your leadership in addressing this important issue as all of us work to protect the rights of consumers and consumer product companies from the activity. Please do not hesitate to contact me should you have any questions.

Sincerely,

AUSTIN P. SULLIVAN, JR.
Senior Vice President

KELLOGG COMPANY
BATTLE CREEK, MICHIGAN, 49016-3599
July 31, 2001

The Hon. Herbert H. Kohl
U.S. Senate
Committee on Antitrust, Business Rights, and Competition
Disksen Senate Office Building 224
Washington, DC 20510

Dear Chairman Kohl:

We ask you to support S. 1233, legislation which would criminalize printed matter from being inserted into our products and packaging.

Kellogg Company is a food manufacturer of products including breakfast cereals, Kellogg's® Eggo® frozen waffles, Pop-Tarts® and Nutri-Grain® Bars, as well as Keebler cookies and crackers. Over the last few years, we have had some incidents whereby our packages were violated. Although this type of tampering appears not to be intended to affect the integrity of the food, it is still alarming to our consumers who rely on our packaging to protect the products they feed their families.

In 1994, Congress passed the Federal Anti-Tampering Act to protect consumers from the dangers of using products whose content or labels had been tampered with. The Act was intended to safeguard consumers from physical health risks related to such tampering and to protect consumer confidence in commercial products. While the 1994 Act has effectively addressed certain incidents of tampering with consumer products, there are still gaps in the law that fail to address the recent nationwide outbreak of tampering with product packages and labels. The Consumer Product Protection Act of 2001 aims to fill-in these gaps in the law.

Incidents of tampering jeopardize the critical relationship between manufacturers of consumer products and their customers. Furthermore, the effects of tampering incidents can be harmful to consumers, manufacturers, and stores.

For example, a consumer may open a package and find a piece of paper containing hateful language and offensive graphic images. The consumer would likely lose trust in the manufacturer of the product and be wary of purchasing their products in the future. This loss of consumer confidence is possible even if the tampering does not affect the product within the package or the product's labeling. Consumers assume that the manufacturer is responsible for the entire product packaging, finding materials inserted in or on the packaging may cause consumers to lose confidence in the safety of the actual product and in the manufacturer's safety precautions generally. The simple fact that a product was tampered with at any level, even with materials unrelated to the product itself, might cause consumers to question the overall product safety and jeopardize their continuing relationship with the manufacturer. Similarly, the consumer may lose confidence in the store where the product was purchased. They may feel that the store management did not take sufficient precautions either in purchasing its inventory from manufacturers or in safeguarding the products on its store shelves. For companies dependent on consumer patronage, development of consumer confidence in the companies' products or services is critical. Offensive materials in or on the packaging of a product can irreparably harm the trust-relationship between manufacturers or retailers, and consumers.

We urge you to support S. 1233.

Sincerely,

GEORGE A. FRANKLIN

